Supreme Court, U.S.
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No. 87-1249

In The

Supreme Court of the United States

October Term, 1987

PLITT THEATRES, INC., a corporation,
Petitioner,

vs.

SAM T. COSTON,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT

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ARGUMENT

I.

THE CHARGE THAT PETITIONER WAIVED THE ISSUE OF CORRECTNESS OF THE WILFULNESS INSTRUCTION IS A RED HERRING BECAUSE THE SEVENTH CIRCUIT DECIDED THE ISSUE ON THE PRESUMPTION THAT THERE WAS NO WAIVER.

The Seventh Circuit in the case at bar expressly stated:

> We do not reach the question of whether Plitt waived its right to appeal the issue of whether *Syvock* is sufficient under *Thurston* because we hold that even presuming that it did not waive its right to appeal the question, *see Rengers v. WCLR Radio Station, slip. op. at 9-10 (7th Cir. Aug. 4, 1987); see also General Beverage Sales Co. v. East-Side Winery,* 568 F.2d 1147, 1152 (7th Cir. 1978) (finding no waiver in similar circumstances); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494-95 (9th Cir. 1986); *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (per curiam); *Hegger v. Green*, 646 F.2d 22, 26-27 (2d Cir. 1981) (relying on the reasoning of *General Beverage*), there was no error. (Pet. App. A, 9a)

Thus the question of waiver is not material to the instant petition.

Although the Seventh Circuit did not pass on the issue of waiver in the case at bar, it indicated that it did not find a waiver in other cases presenting similar circumstances. If this Court should see fit to grant *certiorari* to review the question of law, the question of waiver could be remanded to the lower court for resolution. The question of waiver simply is not material to the merits of the instant petition.

II.

THE PETITION CONTAINS NO "MATERIAL INACCURACY" AS RESPONDENT IRRESPONSIBLY CHARGES.

Contrary to Respondent, Plitt's Petition for Certiorari does not present a "material inaccuracy" with respect to Petitioner's objection to the trial court's instruction on "wilfulness".

Citing Supreme Court Rule 21.5, Respondent charges:

> Nothing short of misleading is Plitt's averment (Pet. at 8) that it objected to the trial judge that a *Syvock* instruction equated wilfulness with mere negligence, and that Plitt's mere knowledge of the ADEA would not amount to a wilful discharge. Plitt's Petition does not cite to the trial transcript because Plitt made no such objection. (Resp. Br. Opp. to Pet. for Cert. 7).

The quoted passage from page 8 of the Petition does not assert that the phrase "over petitioner's objections" is confined to the conference on jury instructions. While admittedly the phrase may be inappropriate to the meaning intended, it is clear from the record that the objections were made in the trial court not only at the time of the jury conference on instructions, but while the post-trial motion was pending. Hence the trial court had an adequate opportunity to correct the error of giving the *Syvock* instruction, at least to the extent of granting a new trial.

The record shows that in fact Petitioner objected to the *Syvock* type of instructions at several stages in the proceedings:

1. At the conference on jury instructions counsel for Plitt, in opposing the giving of Plaintiff's instruction 12 (*Syvock*), said:

> I don't think there is an iota of evidence on wilfulness, Judge, as defined in – in some circuits they define it as an intentional deliberate discharge, and in others they say it has to be a reckless kind

> of thing. I don't think there's any evidence – in fact the evidence is to the contrary in letting Mr. Coston go. (Tr. 293).

The foregoing objection, sufficiently informed the district judge that other circuits (prior to *Thurston*) were applying a far more stringent criterion of wilfulness than encompassed in the "knew-or-should-have-known" standard in *Syvock*, which was the model of instruction 12 tendered by plaintiff.*

2. Promptly after this Court's decision in *Thurston*, and while Plitt's trial motion was pending and undetermined by the trial court, Plitt cited *Thurston* as an additional authority to the trial judge and argued:

> By implication the Supreme Court has rejected the standard enunciated by the Seventh Circuit in *Syvock* . . . showing that the employer simply 'knew or should have known' not the equivalent of 'reckless disregard'. A mere showing that the employer 'knew' or 'should have known' [is] not the equivalent proof of a 'reckless disregard' of the act. (Def. Mtn. for Leave to File Addnl. Authority Concerning Newly Decided Opinion of U.S. Supreme Court, 2).

The record shows that plaintiff thereafter filed an 11-page response opposing Plitt's suggestion that *Thurston* was applicable and dispositive of the instant case.

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* In one of plaintiff's trial court briefs he asserted:

> In the 7th Circuit, in order to find wilfulness, the jury must find that the defendant either knew or reasonably should have known that its actions were a violation of the law. . . *Syvock* v. *Milwaukee Boiler*, 665 F. 2d 149, at 155-156 (7th Cir. 1981). In the case at bar the *Syvock* instructions on wilfulness was tendered as plaintiff's proposed Jury Instruction No. 12, accepted by the court and tendered to the jury. (Prevailing Plaintiff's Brief in Reply to Defendant's Response to Plaintiff's Petition for Judgment on All Issues Subsequent to Jury Verdict, p. 4).

3. Respondent misinterprets the passage quoted from p. 8 of the Petition for Certiorari. The record shows that Petitioner did object to the giving of the *Syvock* instruction, and that the *Syvock* instruction is equivalent to a standard of mere negligence and not of recklessness or any other element of wilfulness posited by *Thurston*. In any event, the passage quoted hardly amounts to a "material inccuracy" as respondent charges in a nitpicking effort to swerve this Court's attention from a pure question of law important enough to warrant the Court's review.

III.

THE ERROR WHICH PETITIONER SEEKS TO REVIEW IN THIS COURT WAS CRITICAL, NOT "HARMLESS".

Respondent argues that "certiorari should not be granted as any error was harmless'. (Resp. Br. 12).

It should be noted that neither the trial judge nor the Seventh Circuit made any finding that the giving of the *Syvock* instruction as opposed to a *Thurston*-type instruction on wilfulness was "harmless error". If the point was regarded as "harmless", such finding expectably would have been made by the Court.

Respondent asserts:

> Plitt stipulated that it was at all times aware of the *illegality* of age discrimination (as opposed to merely knowing that the ADEA was in the picture, or that the ADEA applied) . . . If the jurors were convinced from the evidence that Plitt knew that age was a determining factor, then the jurors could *automatically* (based on the stipulation) conclude that Plitt also knew that it was acting illegally. (Resp. Br. 12). (Emphasis added).

Plitt's stipulation that it was awa e of the illegality of age discrimination placed it on no different footing than any other employer who is required to post ADEA notices. Indeed, this Court addressed the identical issue in *Thurston* where it rejected the notion that an employer's

knowledge of the illegality of age discrimination was sufficient to support a finding of wilfulness. This Court said in *Thurston:*

> "More importantly, the broad standard proposed by the Respondent would result in an award of double damages i*in almost every case.* As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme." 105 S. Ct. at 625). (Emphasis added)

Respondent persists in the serious error that an employer's knowledge of the existence of the ADEA (which implies "illegality" of age discrimination), "automatically" compels an inference that the discharge was *wilful.* If that is so, the two-tiered scheme of liability of the ADEA is obliterated—the very result condemned in *Thurston.*

As to Respondent's assertion that the alleged discriminatory admission was made by Irwin Cohen (who was not the decision maker) – that point was adequately addressed in the *PETITION FOR CERTIORARI* (ftnt 3, pp. 7-8) and need not be repeated here.

CONCLUSION

For all of the foregoing reasons and those contained in the Petition, petitioner respectfully prays that this PETITION FOR WRIT OF CERTIORARI be granted.

Respectfully submitted,

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